

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer  
Marshall Johnson  
Ken Nickolai  
Thomas Pugh  
Phyllis A. Reha

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Complaint of PrairieWave  
Telecommunications, Inc. Against AT&T  
Communications of the Midwest

ISSUE DATE: February 8, 2006

DOCKET NO. P-442/C-05-1842

ORDER FINDING FAILURE TO PAY  
TARIFFED RATE, REQUIRING FILING,  
AND NOTICE AND ORDER FOR HEARING

**PROCEDURAL HISTORY**

On November 21, 2005, PrairieWave Telecommunications, Inc. (PrairieWave), a competitive local exchange carrier serving customers in ten Minnesota exchanges, filed a complaint under Minn. Stat. § 237.462 against AT&T Communications of the Midwest, Inc. (AT&T), an interexchange carrier. The complaint claimed that AT&T was refusing to pay PrairieWave's tariffed rates for intrastate access services, thereby failing to meet its obligations as a telecommunications carrier under Minnesota law and inhibiting local retail competition. The complaint asked the Commission to order AT&T to pay PrairieWave's tariffed access rates.

On December 15, 2005, AT&T filed an answer and counterclaim. The answer admitted that AT&T had not paid monthly invoices submitted by PrairieWave and that it had denied PrairieWave's requests for payment. The counterclaim alleged that PrairieWave's tariffed access rates were unjust, unreasonable, discriminatory, anti-competitive, and therefore illegal and unenforceable. The counterclaim asked the Commission to dismiss the complaint, open an investigation into PrairieWave's access rates, find those rates to be unjust, unreasonable, and harmful to the public interest, and set new rates at just and reasonable levels.

On December 30, 2005, PrairieWave filed an answer to the counterclaim, denying its allegations.

On January 4, 2006, the Minnesota Department of Commerce (the Department) filed comments on the complaint and counterclaim. The Department argued that the complaint turned on legal and policy issues best resolved through argument and analysis and that the counterclaim turned on factual issues best resolved through an evidentiary proceeding.

On January 12, 2006, the case came before the Commission. At that time AT&T admitted that it had refused to pay PrairieWave's tariffed access rates on grounds that they were excessive, had failed to pay the portion AT&T considered non-excessive for an undetermined period of time, and did not have in hand an accurate accounting of the amounts of money at issue.

After the Commission deliberated and determined, among other things, that AT&T was legally obligated to pay PrairieWave's tariffed access rates, AT&T and PrairieWave reached an agreement on the treatment of disputed billings from the filing of AT&T's counterclaim. The two parties agreed that AT&T would establish a private escrow account into which it would deposit the disputed portion of PrairieWave's access charge billings, beginning with the date on which the counterclaim was filed and continuing through the pendency of this proceeding.

## **FINDINGS AND CONCLUSIONS**

### **I. Summary of Commission Action**

The Commission finds that AT&T is obligated to pay PrairieWave's tariffed access rates and that it has failed to do so. The Commission rejects AT&T's contention that it was authorized to withhold payment on the basis of its belief that the tariffed rates were excessive, unjust, unreasonable, and therefore illegal.

The Commission will treat AT&T's counterclaim that PrairieWave's tariffed access rates are excessive, unjust, unreasonable, and therefore illegal, as a complaint under Minnesota Rules 7812.2210, subp. 17 and will refer it to the Office of Administrative Hearings for evidentiary development.

These actions will be explained in turn.

### **II. AT&T Was and Is Obligated to Pay Tariffed Access Rates**

The filed rate doctrine is the longstanding regulatory principle that common carriers are bound by the terms of their tariffs; they cannot make side agreements with individual customers, and any side agreements they do make will be stricken. *Black's Law Dictionary*<sup>1</sup> defines the filed rate doctrine in this way:

**Filed rate doctrine.** Doctrine which forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate federal regulatory authority.

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<sup>1</sup> *Black's Law Dictionary*, sixth edition.

Although state and federal policy initiatives promoting competition in the local telecommunications market now give carriers unprecedented flexibility in pricing their services, the filed rate doctrine remains intact. No matter how flexible pricing decisions may become, prices and rates must be filed with the Commission and charged uniformly throughout carriers' service areas,<sup>2</sup> including prices and rates subject to adjustment in response to unique cost, geographic, or market factors or unique customer characteristics.<sup>3</sup>

PrairieWave therefore lacked the right to accede to AT&T's request to retroactively adjust its access rates, and AT&T lacked the right to pay any rate other than the tariffed rate.

Further, AT&T had a duty to promptly pay all access charges incurred. Both the seamless telecommunications network on which the public depends and the competitive telecommunications marketplace that state and federal policymakers seek, require the prompt satisfaction of inter-carrier financial obligations.

Failing to promptly satisfy these obligations threatens the integrity of the network by creating grounds for disconnection<sup>4</sup> and jeopardizes competition by depriving unpaid carriers of the funds they need to stay in business. For these reasons, the Commission has long viewed prompt payment of access charges as an integral part of providing adequate service.<sup>5</sup>

The Commission will therefore require AT&T to make a filing permitting the Commission, the Department, and the parties to this case to determine AT&T's unpaid access charge obligation to PrairieWave. At a minimum, this filing must set forth all amounts billed by PrairieWave since this dispute began, all amounts paid by AT&T, and the difference between the two amounts.

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<sup>2</sup> Minn. Stat. § 237.074; Minn. Stat. §§ 237.07 and 237.09, applicable to telecommunications carriers under Minn. Stat. § 237.035 (e); Minnesota Rules 7812.2100, subps. 2,3, 5, 8, and 9.

<sup>3</sup> Minn. Stat. § 237.07, subd. 2, applicable to telecommunications carriers under Minn. Stat. § 237.035 (e); Minnesota Rules 7812.2210, subps. 2 and 5 A and B.

<sup>4</sup> Disconnection requires Commission approval under Minn. Stat. §§ 237.12, subd. 2 and 237.74, subd. 6 (a) (2) and subd. 9, applicable to telecommunications carriers under Minn. Stat. § 237.035 (e) and under Minnesota Rules 7812.2210, subp. 11.

<sup>5</sup> In the *Matter of Three Petitions to Discontinue Service to Access Plus*, Docket No. P-999/CI-92-1061, P-421/EM-92-999, P-3006/M-92-1032, P-478/EM-92-1031, ORDER PERMITTING DISCONTINUANCE OF SERVICE, REQUIRING 30-DAY WAIVER OF NONRECURRING CHARGES, AND REQUIRING ACCESS PLUS TO SHOW CAUSE (September 4, 1994) and ORDER ACCEPTING LATE-FILED PETITIONS, GRANTING INTERVENTION PETITION, DENYING PETITIONS FOR RECONSIDERATION, AND REVOKING CERTIFICATE OF AUTHORITY (January 14, 1993).

Pursuant to the parties' agreement, the difference between the two amounts from the date of the filing of the counterclaim through the conclusion of this proceeding will be placed in escrow by AT&T.

### **III. AT&T's Counterclaim Merits Investigation**

The counterclaim filed by AT&T alleges that PrairieWave's intrastate access rates are excessive, unreasonable, discriminatory, anti-competitive, and harmful to the public. PrairieWave concedes that these rates are approximately 100% higher than the intrastate access rates charged by the State's largest local exchange carrier, but argues that they are not excessive in light of PrairieWave's costs and other factors.

AT&T raises serious allegations that require investigation. The Commission will therefore treat AT&T's counterclaim as a complaint under Minnesota Rules 7812.2210, subp. 17 and will refer it to the Office of Administrative Hearings for evidentiary development, as set forth below.

## **NOTICE AND ORDER FOR HEARING**

### **I. Jurisdiction and Referral for Contested Case Proceedings**

The Commission has jurisdiction over PrairieWave's provision of intrastate telecommunications services under the Minnesota Telecommunications Act, Minnesota Statutes Chapter 237, including the following specific grants of jurisdiction: Minn. Stat. §§ 237.035 (e), 237.16, 237.081, 237.461, 237.462, and 237.74.

The Commission finds that it cannot resolve the issues raised in the counterclaim on the basis of the record before it. Those issues turn on specific facts that are best developed in formal evidentiary hearings. The Commission will therefore refer the matter to the Office of Administrative Hearings for contested case proceedings.

### **II. Issues to be Addressed**

The issue in this case is whether PrairieWave's intrastate access rates are unreasonable, excessive, unduly discriminatory, anti-competitive, harmful to the public, or otherwise unlawful. Minnesota Rules 7812.2210, subp. 8 authorizes the Commission to change competitive carriers' rates or take other appropriate action upon complaint and upon finding that the rate complained of:

- unreasonably restricts resale;
- is unreasonably discriminatory;
- is deceptive, misleading, fraudulent, or otherwise unlawful;
- impedes the development of fair and reasonable competition or reflects the absence of an effectively competitive market; or
- has caused or will result in substantial customer harm.

Before making these findings the Commission must conduct an investigation under Minnesota

Rules 7812.2210, subp. 17. The investigation may proceed by notice and comment or by contested case proceedings, as in this case.

Minn. Stat. § 237.74, subd. 4 also authorizes the Commission to take remedial action whenever it finds that any rate charged by a telecommunications carrier is unreasonably discriminatory or that any service provided by a telecommunications carrier is inadequate or cannot be obtained.

The parties shall address the above issues in the course of contested case proceedings. They may also raise and address other issues relevant to the counterclaim.

### **III. Procedural Outline**

#### **A. Administrative Law Judge**

The Administrative Law Judge assigned to this case is Steve M. Mihalchick. His address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 349-2544.

#### **B. Hearing Procedure**

- *Controlling Statutes and Rules*

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minn. Rules, parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7829.0100 to 7829.3200, and the Commission's rules governing complaints against competitive local exchange carriers, Minnesota Rules 7812.2210, subp. 17.

Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 660 Olive Street, St. Paul, Minnesota 55155; (651) 297-3000. These rules and statutes also appear on the State of Minnesota's website at [www.revisor.leg.state.mn.us](http://www.revisor.leg.state.mn.us).

The Office of Administrative Hearings conducts contested case proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota State Bar Association.

- *Right to Counsel and to Present Evidence*

In these proceedings, parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions.

- *Discovery and Informal Disposition*

Any questions regarding discovery under Minn. Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minn. Rules, part 1400.5900 should be directed to Kevin O’Grady, Public Utilities Rates Analyst, Minnesota Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651) 201-2218; or Lisa Crum, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (651) 297-5945.

- *Protecting Not-Public Data*

State agencies are required by law to keep some data not public. Parties must advise the Administrative Law Judge if not-public data is offered into the record. They should take note that any not-public data admitted into evidence may become public unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

- *Accommodations for Disabilities; Interpreter Services*

At the request of any individual, this agency will make accommodations to ensure that the hearing in this case is accessible. The agency will appoint a qualified interpreter if necessary. Persons must promptly notify the Administrative Law Judge if an interpreter is needed.

- *Scheduling Issues*

The times, dates, and places of evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and intervening parties.

- *Notice of Appearance*

Any party intending to appear at the hearing must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing.

- *Sanctions for Non-compliance*

Failure to appear at a prehearing conference, a settlement conference, or the hearing, or failure to comply with any order of the Administrative Law Judge, may result in facts or issues being resolved against the party who fails to appear or comply.

### **C. Parties and Intervention**

The current parties to this case are AT&T, PrairieWave, and the Department of Commerce. Other persons wishing to become formal parties shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. Rules, part 1400.6200.

### **D. Prehearing Conference**

A prehearing conference will be scheduled by the Administrative Law Judge. The Office of Administrative Hearings will inform the parties of its time and place.

Parties and persons intending to intervene in the matter should attend the conference, prepared to discuss time frames and scheduling. Other matters which may be discussed include the locations and dates of hearings, discovery procedures, settlement prospects, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

### **E. Time Constraints**

Both PrairieWave and AT&T emphasized their need for prompt resolution of this dispute. AT&T is harmed by uncertainty regarding its financial obligations, and PrairieWave is harmed by uncertainty regarding its revenue stream.

The Commission asks the Office of Administrative Hearings to conduct contested case proceedings in light of these concerns and requests that the Administrative Law Judge submit his final report as expeditiously as possible.

## **IV. Application of Ethics in Government Act**

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 et seq., may apply to this case. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 296-5148, with any questions.

## **V. Ex Parte Communications**

Restrictions on ex parte communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7300-7845.7400, which all parties are urged to consult.

## **ORDER**

1. AT&T shall promptly make a filing permitting the Commission, the Department, and the parties to this case to determine AT&T's unpaid access charge obligation to PrairieWave. At a minimum, the filing must set forth all amounts billed by PrairieWave since this dispute began, all amounts paid by AT&T, and the difference between the two amounts.
2. The Commission hereby refers the issues raised in AT&T's counterclaim to the Office of Administrative Hearings for contested case proceedings, as set forth above.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)

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BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS  
100 Washington Square, Suite 1700  
Minneapolis, Minnesota 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION  
121 Seventh Place East Suite 350  
St. Paul, Minnesota 55101-2147

In the Matter of the Complaint of PrairieWave      MPUC Docket No. P-442/C-05-1842  
Telecommunications, Inc. Against AT&T  
Communications of the Midwest                      OAH Docket No.

**NOTICE OF APPEARANCE**

Name, Address and Telephone Number of Administrative Law Judge:

Steve M. Mihalchick, Office of Administrative Hearings, Suite, 1700, 100 Washington Square,  
Minneapolis, Minnesota 55401; (612) 349-2544

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER:

SIGNATURE OF PARTY OR ATTORNEY: \_\_\_\_\_

DATE: \_\_\_\_\_